Supreme Court, U.S.
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No.—— OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

HOLLY WHITE,
Petitioner,

v.

DAVID FIST, PERSONAL REPRESENTATIVE OF THE ESTATE OF GERTRUDE GELLER, TEMPLE ISRAEL FOUNDATION, MARSHALL GELLER, MICHAEL A. CHOZEN, JAY MYERS CHOZEN, and LORI ANNE CHOZEN,
Respondents.

Petition for Writ of Certiorari to the Oklahoma Court of Civil Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does Oklahoma law deny petitioner equal protection and due process of law by erecting an insurmountable barrier to preclude petitioner, a child born out of wedlock, from establishing, for inheritance purposes, the paternity of her father simply because she had not obtained a judicial determination of paternity by the time he died when she was an infant of fifteen months, where there are now available sophisticated DNA tests that can establish paternity both quickly and definitively.

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

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Petition for Writ of Certiorari to the Oklahoma Court of Civil Appeals

PETITION FOR WRIT OF CERTIORARI

Petitioner Holly White ("Petitioner") seeks review of a decision of the Oklahoma Court of Civil Appeals holding that petitioner, a child born out of wedlock whose putative father died when she was less than two years old, has no standing or right to seek a determination of paternity for inheritance purposes after the death of the putative father, even though Petitioner had no real opportunity to establish paternity before the death of the putative father and even though reliable methods now exist to establish paternity posthumously.

OPINIONS BELOW

The opinion of the Oklahoma Court of Civil Appeals is reported at 1999 Ok. Civ. App. 45, —— P.2d ——, and

reprinted at Pet. App. 1a. The order of the Oklahoma Supreme Court denying a writ of certiorari is unreported and is reprinted at Pet. App. 16a. The ruling of the District Court of Tulsa County is unreported and is reprinted at Pet. App. 12a.

JURISDICTION

The decision of Oklahoma Court of Civil Appeals was filed on January 12, 1999. A timely petition for a writ of certiorari filed with the Supreme Court of Oklahoma was denied on April 6, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> a. Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The versions of Okla. Stat. tit. 84, § 215 in effect both before and after October 1, 1977 are reprinted at Pet. App. 21a-22a.

STATEMENT OF THE CASE

This case raises an important question about the continued viability of this Court's decision in *Lalli v. Lalli*, 439 U.S. 259 (1978), where a closely divided Court

ruled that it did not violate the Fourteenth Amendment for a state to bar an illegitimate child from seeking to inherit from his father by intestate succession because he had failed, *during the lifetime of the father*, to obtain a judicial determination of paternity. The Oklahoma courts in this case applied *Lalli* to deny standing to petitioner to pursue her claims as a potential heir because her putative father had died when she was fifteen months old and she had not, prior to his death, obtained a judicial determination that he was her father. In so doing, they gave continued effect to a constitutional ruling of this Court that has been called into serious question (1) by a series of more recent decisions of this Court invalidating time limits for establishing paternity that were deemed to erect unjustifiably high barriers to the vindication of the rights of illegitimate children, and (2) by the development of DNA techniques for establishing paternity that render largely moot the concerns about disruption of probate proceedings that underlay the *Lalli* Court's constitutional analysis. In light of these factors, it is almost inconceivable that the Court would reach the same result today if it again addressed the constitutional issue presented in *Lalli*. Yet as this case illustrates, the *Lalli* decision continues to be applied to defeat inheritance claims of illegitimates, not only in Oklahoma but in other states as well. It is high time that the Court address this issue and bring its jurisprudence governing the inheritance rights of illegitimates into step with the rest of the related case law, as well as with what is now known about the ability of science to determine paternity definitively.

The Oklahoma Statutory Scheme

Prior to 1977, the Oklahoma intestacy statute, Okla. Stat. tit. 84, § 215, allowed "illegitimate" children to inherit by and through their fathers only if there was

1. Written acknowledgment by the putative father that he is, in fact the father of the child; *and*

2. The putative father and the mother married before the putative father's death and the father acknowledges the child as his. *See* Pet. App. 21a-22a.[1]

After this Court's decision in *Trimble v. Gordon*, 430 U.S. 762 (1977), the Oklahoma Legislature recognized that this statute was unconstitutional, because it unduly limited the opportunities of an illegitimate child to proceed as a potential heir. *See Vincent v. Sutherland*, 691 P.2d 85, 87 n.2 (Okla. Ct. App. 1984). The legislature amended the statute to allow an illegitimate child to inherit by and through the father, if:

(a) [T]he father, in writing, . . . acknowledged himself to be the father;

(b) [T]he father and mother intermarried subsequent to the child's birth and, the father, after such marriage, acknowledged the child as his own or adopted him into his family;

(c) [T]he father publicly acknowledged such child as his own, receiving it as such with the consent of his wife, if he is married, into his family and otherwise treating it as if it were a child born in wedlock, or

(d) [T]*he father was judicially determined to be such in a paternity proceeding before a court of competent jurisdiction.*

Pet. App. 21a (emphasis added).

In 1990, the Oklahoma Supreme Court in the case of *Estate of King*, 837 P.2d 463 (Okla. 1990), upheld the

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[1] Because these events did not occur before petitioner's father's death in 1960, she had no opportunity from 1960 to 1977 to do anything to preserve her rights as a potential heir.

constitutionality of the revised section 215. In so doing, it interpreted subsection (d) as requiring a judicial determination of paternity "before the death of the father." *Id.* at 467. As a result, the Oklahoma statutory scheme, as construed, still flatly bars any claim to inheritance where the claimant seeks to prove paternity for the first time after the putative father's death.

The Relevant Facts

Petitioner Holly White was born from a non-marital union in December 1959. Fifteen months later, her putative father, Jay Myers, died of leukemia. Although Holly's mother, Diane White, had notified and spoken with Myers regarding the pregnancy and Holly's birth, no formal acknowledgment of paternity had been made by the father. Pet. App. 17a-18a. Neither Holly nor her mother received any notice of the putative father's death.

In 1991, Holly learned the identity of her paternal grandmother, Gertrude Geller, formerly Myers. Petitioner is the only grandchild of Mrs. Geller through Jay Myers. Mrs. Geller had three grandchildren through a daughter. Upon learning about her grandmother, petitioner made contact with her, describing her claim to be the only child of Mrs. Geller's late son.

Proceedings Below

Mrs. Geller died in October, 1997. By obituary in a Tulsa, Oklahoma newspaper, Petitioner learned of Mrs. Geller's passing and filed a claim in the Geller probate proceedings to her father's share of the estate. The personal representative, joined by other beneficiaries of Mrs. Geller's estate, moved to dismiss petitioner's claims, arguing that she did not have standing under Oklahoma law to seek inheritance. Petitioner responded that if state law were so interpreted, it would violate her rights to due

process and equal protection under the Fourteenth Amendment.

After extensive briefing and oral argument before the probate court, the probate judge dismissed Holly's claims. Holly was declared to lack standing because she had not proven paternity before her father's death. The Court stated:

> I will sustain the motion to strike all of the White pleadings. She has no standing. She has *never* had standing under Oklahoma law. She does not have standing under Oklahoma law today.

Pet. App. 19a (emphasis added).

Holly appealed the trial court's decision to the Oklahoma Supreme Court. The Oklahoma Supreme Court assigned the appeal to the Oklahoma Court of Civil Appeals. On January 12, 1999, the Oklahoma Court of Civil Appeals issued its opinion affirming the probate court's ruling. In expressly rejecting petitioner's constitutional claims, the court relied upon *King, supra*, in which the Oklahoma Supreme Court in turn relied heavily, if not exclusively, upon *Lalli v. Lalli*, 439 U.S. 259 (1978). *See* Pet. App. 8a ("[I]n *King*, the supreme court specifically concluded that '[s]ection 215 of title 84 does not violate the Equal Protection Clause of the federal Constitution.' ") (citing 837 P.2d at 466); Pet. App. 10a ("The Oklahoma Supreme Court has determined that 84 O.S. 1991 § 215, in its present form, and with the 'special burdens' it imposes, is constitutional and protects the State's legitimate interest in the orderly disposition of estates."). Although petitioner had directed the court's attention to more recent case law of this Court dealing with statute of limitations governing paternity claims, the court did not address those cases.

Petitioner asked the Oklahoma Supreme Court to review the Court of Civil Appeals' decision. On April 6, 1999, that Petition for Writ of Certiorari was denied. Pet. App. 16a.

REASONS FOR GRANTING THE WRIT

This Court has long held that the equal protection clause does not permit the categorical exclusion of illegitimate children from the right to inherit by intestate succession from the fathers. *Trimble v. Gordon*, 430 U.S. at 770-71. Here, however, as a result of the application of Oklahoma law, Petitioner has never had a meaningful opportunity to establish paternity and thereby protect her intestacy rights. Under the law in effect when she was born and when her father died 15 months later, she had no right to pursue a claim. And when the statute was amended after *Trimble* in 1977 to allow putative heirs to make claims in intestacy proceedings based on judicial determinations of paternity, the law was construed to require a "before death" determination. That option was, of course, unavailable to petitioner, just as it is unavailable to many other children born out of wedlock in Oklahoma and the many other states that retain a rule requiring a judicial determination of paternity before a father's death, as a precondition to a later effort to claim inheritance in intestacy proceedings. *See* Charles Nelson Le Ray, *Implications of DNA Technology on Posthumous Paternity Determination: Deciding the Facts When Daddy Can't Give his Opinion*, 35 B.C. L. Rev. 747, 753 (1994) ("Many states have long made it impossible for children to establish paternity after their fathers' deaths, especially for intestate inheritance purposes.") (citing examples); Eileen M. Teicher, *Out for Blood: Proving Paternity When Daddy's Dead*, 13 J. Juv. L. 80, 82 (1992) ("Only a few states recognize the illegitimate

child's right to assert a cause of action determining paternity after the putative father's death.") In those states that bar posthumous paternity claims, when a father happens to die relatively soon after the child is born, the failure of the *mother* to act quickly to obtain a determination of paternity will mean that the *child* is permanently barred from claiming inheritance.

In 1978, this Court in *Lalli v. Lalli* held that it is constitutionally permissible for a state to mandate that illegimate offspring forfeit their inheritance rights if they have not obtained a judicial determination of paternity prior to their fathers' deaths. 439 U.S. at 275-76. But the legal and factual underpinnings of that decision have been eroded to the point where the ruling is no longer supportable. It is time that the Court recognize that reality and overrule a decision that is still being used to defend unjustifiable forms of discrimination based on illegitimacy.

Turning first to the legal developments, in a series of cases dealing with statutes of limitations for paternity claims against living putative fathers, this Court invalidated a one-, a two- and a six-year statute on the ground that each bore an insufficient relation to any applicable and legitimate state interest. *Mills v. Habluetzel*, 456 U.S. 91 (1982); *Pickett v. Brown*, 462 U.S. 1 (1983); *Clark v. Jeter*, 486 U.S. 456 (1988). These cases, in turn, have been applied by the Eleventh Circuit to bar application of a "proof during the lifetime" requirement (borrowed from state intestacy laws) to applicants for survivor benefits under the Social Security Act. *Daniels v. Sullivan*, 979 F.2d 1516 (11th Cir. 1992); *Handley v. Schweiker*, 697 F.2d 999 (11th Cir. 1983). *But see Campbell v. Apfel*, No. 96-35285, 1999 U.S. App. LEXIS 10041, at *11 (9th Cir. May 25, 1999) (applying *Lalli*) (upholding denial of survivor benefits where no determination of paternity had occurred before father died).

Second, as a factual matter, the chief concern that underlay the Court's ruling in *Lalli* is no longer applicable. That concern was the "particular problems of proof" involved in posthumous claims of paternity, which mean that "spurious claims may be difficult to expose" and that probate proceedings may accordingly be disrupted. 439 U.S. at 271. Given those problems of proof, the Court was willing to credit the states' assertion that "[a]ccuracy is enhanced by placing paternity disputes in a judicial forum during the lifetime of the father." *Id.* But with the arrival of DNA testing, there are now techniques available to prove, or disprove, paternity quickly and definitively, even after a father's death. *See Clark v. Jeter*, 486 U.S. at 465 (noting advent of "increasingly sophisticated tests for genetic markers [that] permit the exclusion of over 99% of those who might be accused of paternity"); Charles Nelson Le Ray, *supra*, 35 B.C. L. Rev. at 798 (noting that "highly accurate paternity testing is now possible even when the putative father is deceased"). It follows that the constitutional calculus must be reconsidered.

The courts below may have felt a legitimate concern about anticipating the demise of a precedent of this Court that has been called into question by recent developments but has never been overruled. But that is all the more reason why this Court should take the opportunity to overturn a decision that no longer makes sense. *Lalli* is an outlier in the law. Most if not all 50 states, prodded by Congress, now give children 18 or more years to establish paternity against living fathers obligated to pay child support. But a disturbing number of states still provide that children unfortunate enough to have their fathers die before they have established paternity have no rights in the subsequent intestate proceedings, and courts continue to apply *Lalli* to justify such a draconian rule. *See, e.g.*,

Estate of Sanders, 3 Cal. Rptr. 2d 536, 544-45 (Cal. Ct. App. 1992); *Estate of King*, 837 P.2d at 466. Moreover, those laws have an unfortunate spillover effect on eligibility for Social Security survivor's benefits, at least outside the Eleventh Circuit. *See, e.g., Campbell v. Apfel*, 1999 U.S. App. LEXIS 10041. A grant of review is therefore highly warranted.

I. THE COURT SHOULD GRANT REVIEW TO CONSIDER THE IMPACT OF MORE RECENT CASES ON *LALLI* AS A PRECEDENT.

In 1976, in *Trimble v. Gordon*, the Court for the first time extended constitutional protection to the inheritance rights of illegitimates. In so doing, it commented:

> The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as unjust—way of deterring the parent.

430 U.S. at 769-70 (internal quotation marks and citation omitted).

A year later, in *Lalli*, the Court held by a 5-4 vote that it was permissible for a state to deny the right to inherit by intestate succession to those illegitimate children who failed to obtain a determination of paternity during the lives of their fathers. It has been over twenty years since that decision, and significant events have occurred in the interim. Three other decisions of this Court have held that state statutes did not provide an illegitimate child a

sufficient opportunity to establish a right to benefits otherwise granted to legitimate children and thus violated the equal protection clause. Those cases—*Mills v. Habluetzel*, 456 U.S. 91 (1982), *Pickett v. Brown*, 462 U.S. 1 (1983), and *Clark v. Jeter*, 486 U.S. 456 (1988)—all followed *Trimble* and relied on reasoning that is very hard to square with *Lalli*. In each case, the Court invalidated a statute of limitations that had the effect of barring a minor child from seeking child support against a living putative father.

The Court in *Mills, Pickett* and *Clark* applied intermediate scrutiny, assessing whether imposition of given limitations period on illegitimates seeking the same support guaranteed to legitimates was substantially related to the governmental interest in barring stale or fraudulent claims. In *Mills* the Court invalidated a one-year statute of limitations. The *Pickett* Court saw no greater state interest in enforcing a two-year limitation. Finally, in 1988, the Court in *Clark v. Jeter* held that Pennsylvania had no substantial interest in applying even a *six*-year statute. In so doing, it noted that the state (along with the rest of the states) had recently enacted an 18-year statute of limitations governing paternity claims against living fathers. 486 U.S. at 465. It also recognized that sophisticated genetic tests of paternity were now available. *Id.* The Court concluded that the state had no "substantial reason" to cut off at six years the time when a child could assert a claim of paternity. *Id.*

In this case, by contrast, Oklahoma has taken the position that petitioner's right to inherit by intestate succession was properly cut off when she was 15 months old because of the fortuity that her father happened to die. That position is, to say the least, in tension with the *Mills-Pickett-Clark* trilogy. If the Constitution does not allow a state to cut off paternity suits after six years, it

is hard to see how the same Constitution can allow extinguishment of rights of inheritance by intestate succession whenever a father happens to die—even one day after a birth.

The tension was recognized by the Eleventh Circuit in *Handley* and *Daniels*. There, the court was dealing with federal Social Security survivor benefits, which are awarded under a federal statute that incorporates state intestacy laws as a test of eligibility. *See generally Lawrence v. Chater*, 516 U.S. 163, 164 (1996) (*per curiam*). While expressly limiting its ruling to that statutory context, the Eleventh Circuit still called into serious question the continued viability of *Lalli* in the wake of the *Mills-Pickett-Clark* trilogy. In *Handley*, the putative father died when the claimant was four months old. The court of appeals held that application of the Alabama intestacy law, with its requirement of a determination of paternity prior to the death of the father, would create an unconstitutional insurmountable barrier. In *Daniels*, the child was two when the father died. The court relied on *Handley* to reject application of the Georgia intestacy statute as a test of eligibility for survivor benefits. The Eleventh Circuit concluded in its opinion:

> . . . We conclude that, as applied to the facts of this case, the Secretary's requirement that [the minor] establish paternity within two and one-half years violated [the minor's] right to equal protection of [the] law and that [the minor] is entitled to receive survivors benefits under the Social Security Act.

979 F.2d at 1522. It added:

> The subclass of illegitimate children who are conclusively denied benefits because of the "during the lifetime" requirement may be numerically small, but that does not make it less deserving of constitutional protection.

Id. (internal quotation marks and citation omitted).

But other courts continue to apply *Lalli* to cut off the rights of illegitimates. First, in state intestacy proceedings, some courts—like Oklahoma, *see Estate of King*, 837 P.2d at 466—continue to enforce the requirement that paternity have been judicially determined before the putative father's death. *See, e.g., Estate of Sanders*, 3 Cal. Rptr. 2d at 544-45; *Estate of Smith*, 685 So. 2d 1206, 1208 (Fla. 1996); *Estate of Erbe*, 457 N.W.2d 867, 869-70 (S.D. 1990).

Moreover, just last month, the Ninth Circuit applied *Lalli* to justify denial of Social Security survivor benefits to a claimant. *See Campbell v. Apfel*, 1999 U.S. App. LEXIS 10041. In that case, the claimant's putative father died when the claimant was five years old. *Id.* at *2. A state suit seeking child support had been filed, and DNA evidence showed a "98.14 percent probability" that the defendant was the father. *Id.* But because the issue of paternity had never been resolved in that state proceeding, the Ninth Circuit affirmed the denial of survivors benefits, based on a borrowed California intestacy law requiring a finding of paternity before the father's death. In so doing, it relied on *Lalli* as continuing to be good law. *Id.* at *11 ("Relying on *Lalli*, the state court properly held that, 'requiring a court order establishing paternity to be issued during the father's lifetime is substantially related to the state interest the statute was intended to promote.' ") (quoting *Sanders*, 3 Cal. Rptr. 2d at 545).

A grant of certiorari in this case would almost certainly have the additional benefit of resolving the current irreconcilable conflict between the Eleventh and Ninth circuits over the constitutionality of applying a requirement of a before-death paternity determination, borrowed

from a state law like Oklahoma's, to deny federal survivor benefits.[2]

II. THE COURT SHOULD GRANT REVIEW TO REASSESS *LALLI* IN LIGHT OF INTERVENING DEVELOPMENTS IN THE TECHNIQUES FOR DETERMINING PATERNITY.

Even if the law had not evolved since 1978, developments in scientific techniques used to determine paternity would warrant a full reassessment of *Lalli*. The primary basis for the *Lalli* Court's conclusion that states have a substantial interest in requiring paternity determinations during the life of the putative father was the "particular problems of proof" thought to arise when paternity claims are filed posthumously. 439 U.S. at 269. The Court accepted the state's assertion that allowing claimants to assert paternity for the first time in probate proceedings would be unduly disruptive and invite fraudulent and harassing claims. *Id.* But there is no reason to think that the Court, looking at the issue fresh in light of the DNA testing techniques now available, would come to the same conclusion.

The introduction of DNA testing in recent years provides a much more flexible and much more certain technique for determining paternity—and a technique that can be used even after the putative father has died. Unlike traditional blood tests, DNA tests can use any tissue samples that contain cellular material. Le Ray, *supra*,

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[2] The Court previously granted certiorari to resolve a closely related conflict between the Eleventh Circuit's rulings and the Fourth Circuit's position that the possible unconstitutionality of the state law borrowed by the Social Security Act was irrelevant as a basis to allow a claimant survivor benefits. *Lawrence v. Chater*, 516 U.S. at 164. That case, however, was remanded to the Fourth Circuit without a merits ruling, after the Government changed its position in this Court. *See id.* at 175.

at 764-65. Often, such samples are obtained through exhumation. *See id.* at 767 ("Some courts have ordered exhumations and the release of blood and tissue samples of the deceased so that DNA testing could be performed, noting that scientific advances have removed the problems of proof that long barred posthumous paternity actions.")[3] Moreover, even if such samples are unavailable, DNA from close relatives is often sufficient to reconstruct a person's DNA fingerprint. *Id.* at 765; *see Sudwischer v. Estate of Hoffpauir*, 589 So. 2d 474 (La. 1991) (directing putative sibling to submit blood sample for use in verifying paternity of deceased).

For these reasons, the concerns about problems of proof that traditionally led states to bar paternity claims asserted after the putative father's death no longer apply. As one court has put it,

> The problems of proof which have been the basis of denying inheritance rights to illegitimate children have been removed by the advent of this new genetic testing. Therefore, this court can no longer be a participant in denying the opportunity to an illegitimate child to prove his paternity.

Alexander v. Alexander, 537 N.E.2d 1310, 1314 (Ohio Prob. Ct. 1988), *dismissed as moot*, 560 N.E.2d 1337

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[3] As one court, construing a statute much like Oklahoma's, commented:

> The exhumation or autopsy of a corpse, when useful to ascertain facts in litigation, should of course be performed. Reverence for the memory of those who have departed does not require us to abdicate the high duty of doing justice to the living. . . . The exhumation of a corpse, often a material assistance in insurance or inheritance cases, is demandable on this principle, subject of course to the trial court's discretion as to necessity.

Wawrykow v. Simonich, 653 A.2d 843, 846 (Pa. Super. Ct. 1994) (internal quotation marks and citation omitted).

(Ohio Ct. App. 1989). *See also Wawrykow v. Simonich*, 652 A.2d 843, 844 (Pa. Super. Ct. 1994) ("We find that *Trimble* and its progeny were preoccupied with a 'proof problem' that has been ameliorated by the advances made in the medical field with regard to blood testing.")

It further follows that the constitutional balance struck in *Lalli* must be reconsidered. The sole basis of the Court's ruling in *Lalli* was acceptance of the proposition that problems of proof in posthumous paternity cases were so severe that to allow them would be to invite disruption of the probate process, harassment of participants in that process, and fraud. 439 U.S. at 525-26.[4] Those state interests, however, are no longer substantial in a world where DNA testing can very often confirm or invalidate a paternity claim quickly and definitively.

This Court has previously suggested that where there are " 'lurking problems with respect to proof of paternity,' " those problems cannot be " 'lightly brushed aside.' " *Pickett v. Brown*, 462 U.S. at 9 (quoting *Gomez v. Perez*, 409 U.S. 535, 538 (1973)). But it went on to say that "those problems [cannot] be used to form "an impenetrable barrier that works to shield otherwise invidious discrimination.' " *Id.* (quoting *Gomez*, 409 U.S. at 538). That would be precisely the effect of leaving in place the *Lalli* rule that the Constitution permits the states to erect a flat bar to assertions of paternity claims in the intestacy proceedings after a putative father's death —based on supposed "problems of proof" that no longer exist.

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[4] The Court also suggested that the goal of "finality" is served by restricting claimants to legitimate and those illegitimates with prior judicial determinations of paternity. 439 U.S. at 525-26. That problem, however, can be addressed by adopting a rule prescribing adequate forms of notice to potential claimants and deadlines for filing claims.

It would be particularly anomalous to ignore the developments in techniques for proving paternity in the instant context, in view of the prominent role such advances played in the *Mills-Pickett-Clark* trilogy. Thus, as far back as 1982 in *Mills*, Justice O'Connor noted in a concurring opinion joined by four other justices that "[t]he state's concern about stale and fraudulent claims is substantially alleviated by recent scientific developments in blood testing dramatically reducing the possibility that a defendant will be falsely accused of being the illegitimate child's father." 456 U.S. at 104, n.2 (O'Connor, J., concurring). And more recently, in *Clark v. Jeter*, Justice O'Connor, writing for a unanimous Court, reiterated the point. She noted that Congress in 1984 had effectively mandated that states change their statutes of limitations governing paternity suits against living putative fathers to 18 or more years. 486 U.S. at 465. And she explained:

> The legislative history of the federal Child Support Enforcement Amendments explains why Congress thought such statutes of limitations are unreasonable. Congress adverted to the problem of stale and fraudulent claims, but recognized that increasingly sophisticated tests for genetic markers permit the exclusion of over 99% of those who might be accused of paternity, regardless of the age of the child. H.R. Rep. No. 98-527, p. 38 (1983). This scientific evidence is available throughout the child's minority, and *it is an additional reason to doubt that Pennsylvania had a substantial reason for limiting the time within which paternity and support actions could be brought.*

Id. (emphasis added).

It is now equally clear that, even if states once had a "substantial reason" to bar assertions of paternity after

a father's death, that is no longer the case. It has now become a form of pure invidious discrimination for a state to adhere the rule that a person loses the right to make a claim to inheritance by intestate succession if her father happens to die when she is an infant, prior to the successful assertion on her behalf of a judicial paternity claim. The Court should grant review to rectify a problem that has arisen as a constitutional decision based on then-existing facts has become grossly outmoded.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

[Filed Jan. 12, 1999]

IN THE COURT OF CIVIL APPEALS
STATE OF OKLAHOMA
DIVISION 2

No. 91,420

IN THE MATTER OF THE ESTATE OF
GERTRUDE JO GELLER, deceased.

HOLLY WHITE,

Appellant,

vs.

DAVID L. FIST, personal representative of the ESTATE OF GERTRUDE JO GELLER, deceased; LORI ANNE CHOZEN; JAY MYERS CHOZEN; MICHAEL ALAN CHOZEN; MARSHALL GELLER; and, TEMPLE ISRAEL FOUNDATION, INC.,

Appellees.

Appeal from the District Court of
Tulsa County, Oklahoma

Honorable David E. Winslow, Trial Judge

AFFIRMED

OPINION

STUBBLEFIELD, P.J.

This is an appeal from judgment in a probate case, based on a finding that contestant lacked standing, denying a will contest and striking a counterclaim requesting determination of heirship. Based on our review of the record on appeal and applicable law, we affirm.

The record reveals that Gertrude Geller was married to Louis Myers for many years and had two children from that marriage, a son, Jay, and a daughter, Linda. Jay Myers was born on June 13, 1936, and died of leukemia on March 3, 1961. Jay Myers had never married, never adopted a child nor took a child into his home and was never determined to be the father of any child in a paternity action or named a party in such an action prior to his death. Linda Myers Chozen died on February 22, 1991. She was survived by three children, Lori Chozen, Michael Chozen and Jay Myers Chozen.

In 1975, Gertrude Geller married Marshall Geller. There were no children from that marriage.

On May 25, 1991, Plaintiff Holly White contacted Gertrude Geller by telephone, claiming to be her granddaughter—the child of Mrs. Geller's deceased son, Jay Myers. Apparently, Mrs. Geller did not wish to communicate with White and, through her attorney, David Fist, requested that White refrain from further attempts to contact her.

On June 26, 1991, Gertrude Geller executed her Last Will and Testament.[1] After gifts to grandnieces and grandnephews and certain charitable gifts, including a

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[1] Gertrude Geller executed three codicils to her will, in October 1993, September 1994 and February 1997.

substantial charitable gift to Temple Israel Foundation, Gertrude Geller named Linda's three children as her residual beneficiaries. "Article IX" of her will contained the following "Forced Heirship and Will Contest Clause:"

> 1. I hereby direct that should there be anyone not herein specifically or indirectly mentioned or provided for who would inherit a portion of my estate had I not executed this Will, such person or persons shall receive One Dollar ($1.00) as his, her or their sole and entire inheritance from me.

Gertrude Geller died on October 26, 1997, leaving a substantial estate. Three days later, after learning of Mrs. Geller's death through a newspaper obituary, Holly White filed (1) petitions for letters of administration and determination of heirship, (2) a motion seeking to take a tissue specimen from Gertrude Geller's body, and (3) a motion for temporary restraining order seeking to enjoin the interment of Mrs. Geller's body. White alleged she was the child of Jay Myers—that her mother had a sexual encounter with Myers in 1959 in Kansas City, Missouri, which resulted in White's birth on December 25, 1959—and she sought to inherit her pro rata share of Geller's estate.

Another petition for probate of will was filed by attorney David Fist on behalf of the Estate of Gertrude Geller.[2] White filed a counterclaim seeking to prove her heirship as a pretermitted granddaughter of Mrs. Geller. She filed various pleadings in the probate action, including a motion for partial summary judgment asserting that the terms of Geller's will and the provisions of 58 O.S. 1991 § 132, required determination by the trial court

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[2] Fist was named as second successor personal representative in the will and alleged that others named had declined to serve. Fist was appointed as special administrator of the estate.

that she was a pretermitted heir to Geller's estate as a matter of law—subject to her ability to prove that Jay Myers was, in fact, her biological father.

The special administrator moved to strike White's pleadings on the ground that she had no standing to pursue her claims of inheritance as a pretermitted grandchild in the probate court due to her undisputed inability to establish any of the four grounds set forth in 84 O.S.1991 § 215,[3] for an out-of-wedlock child to show paternity and inherit through the father. The Chozen family also filed a motion for summary judgment based on standing and the will's *in terrorem* clause. The issues were thoroughly briefed.

The trial court rendered judgment on the dispositive issue of standing. The trial court sustained the special administrator's motion to strike all pleadings filed by White. In finding that White had no standing to make a claim in the proceeding, the trial court adopted "*in toto*" the reasoning and legal authorities set forth in the briefs filed by the special administrator, Temple Israel and the Chozen family that specifically addressed the issue of standing. White appeals.

As a preliminary matter, we note that, technically, a motion to strike was not the proper method for disposing of the counterclaim and other pleadings filed by White. Title 12 O.S.1991 § 2012(D), provides only for motions to strike "an insufficient defense." The proper method for asserting a party's lack of standing is by motion to dismiss. *See Independent Sch. Dist. No. 9 of Tulsa County v. Glass*, 1982 OK 2, ¶ 10, 639 P.2d 1233, 1237.

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[3] The statute was revamped and amended in 1977 to cure the 1910 law's unconstitutional "inheritance discriminaton against a non-connubial child and [now] places the latter on the same heirship footing with a connubial chlid." *Vincent v. Sutherland*, 1984 OK CIV APP 4it ¶ 9 n.2, 691 P.2d 85, 87 n.2.

Thus, we view the improperly denominated motion to strike filed by the special administrator as the functional equivalent of such a motion under section 2012(B)(6)—a motion to dismiss for failure to state a claim upon which relief can be granted. However, because matters outside the pleadings were presented to and not excluded by the trial court, the motion must be treated as one for summary judgment. Section 2012(B).

In her first proposition of error, White specifically addresses the issue of standing. A party has standing either through a specific statute authorizing invocation of the judicial process or if she alleges a personal stake in the outcome of the controversy—"a sufficient interest in an otherwise justiciable controversy to obtain judicial resolution of the controversy." *Glass*, 1982 OK 2 at ¶ 8, 639 P.2d at 1237. To have standing to participate in a probate proceeding or to object to the probate of a will, a person must have an interest in the property that the testator owned at his death. *See Mayweather v. Wallace*, 195 Okla. 587, 159 P.2d 529 (1945); *In re Estate of Dilley*, 1996 OK CIV APP 64, ¶ 8, 919 P.2d 458, 460.

White summarizes her argument on the issue of standing as follows:

> Upon the death of the decedent, Gertrude Geller, White vested in her right to share in the decedent's estate as a pretermitted paternal granddaughter. Based upon this vested right, White had standing to prove heirship in the probate court.

However, under Oklahoma law, children born out of wedlock may become heirs of and inherit through their father *only* by the methods set forth in 84 O.S.1991 § 215, which provides:

> For inheritance purposes, a child born out of wedlock stands in the same relation to his mother

> and her kindred, and she and her kindred to the child, as if that child had been born in wedlock. *For like purposes, every such child stands in identical relation to his father and his kindred, and the latter and his kindred to the child, whenever*: (a) the father, in writing, signed in the presence of a competent witness acknowledges himself to be the father of the child, (b) the father and mother intermarried subsequent to the child's birth, and the father, after such marriage, acknowledged the child as his own or adopted him into his family, (c) the father publicly acknowledged such child as his own, receiving it as such, with the consent of his wife, if he is married, into his family and otherwise treating it as if it were a child born in wedlock, *or* (d) the father was judicially determined to be such in a paternity proceeding before a court of competent jurisdiction. (Emphasis added.)

The supreme court has noted that this statute places special burdens on children born out of wedlock before they can inherit through their father. *In re Estate of King*, 1990 OK 138, ¶ 6, 837 P.2d 463, 464.

It is undisputed that part (a), part (b) and part (d) are not applicable herein. White does not allege that a written parental acknowledgment exists or that her parents intermarried. Further, no determination of paternity was made before Jay Myers' death. White's only evidence goes to part (c)—public acknowledgment. She offered the affidavit of her mother, which stated: (1) In June 1959, she had informed Jay Myers she was pregnant with his child; (2) Myers advised her that "he had discussed the matter with his father and that his father had told him to 'do the right thing;' " (3) Jay Myers offered to provide financial assistance; and, (4) She called Myers again near

the term of her pregnancy and he gave his reassurance and again offered his financial assistance.

We find this evidentiary material simply fails to establish the statutorily required public acknowledgment of section 215(c)—it fails to show that Jay Myers held Holly White out to his relatives, friends, acquaintances and the whole world as his own. *Kirkland v. Henry*, 1956 OK 130, ¶ __, 296 P.2d 165, 167; *In re Cravens' Estate*, 1954 OK 82, ¶ __, 268 P.2d 236, 240. Therefore, the affidavit does not raise a material issue of fact precluding summary judgment.

Focusing on the language of section 215(d), White urges a construction of that language that would authorize her to bring a paternity proceeding against Jay Myers within this probate proceeding despite the fact that Myers has been dead for thirty-seven years. However, the court in *King* stated that section 215(d) requires "a judicial determination of paternity *before the death of the father.*" 1990 OK 138 at ¶ 12, 837 P.2d at 467 (emphasis added). We cannot agree with White's contention that the court's language is dicta.

Moreover, we do not view the trial court's ruling herein as one that completely precluded White from proving heirship in the probate court. The extensive briefs and evidentiary materials filed below indicate that the trial court gave White ample opportunity to show paternity/heirship through the four methods that the legislature clearly and explicitly set forth in section 215. Indeed, at the hearing on the motion to strike, the trial court asked White's counsel more than once if there was "anybody else" who could serve as a witness on the public acknowledgment issue.

What the trial court did not allow White to do was prove heirship by her preferred method—exhumation of

her alleged father's body—a method that the legislature did not include in section 215. As section 215(d) is phrased—"the father *was* judicially determined to be such in a paternity proceeding . . ."—it does not appear to contemplate post-death genetic testing, and the supreme court has explicitly stated that it does not. *Id.*

In White's final proposition of error, and its sub-propositions, she claims section 215 is unconstitutional as applied to her. She attacks section 215(d) on equal protection grounds, calling it an impermissible special law, and asserts that, if section 215(d) requires a "before death" determination of paternity, the statute operates to deny her vested right to inherit by and through her father without due process of law. For the following reasons, we find no merit to any of White's constitutional claims.

First, in *King*, the supreme court specifically concluded that "[s]ection 215 of title 84 does not violate the Equal Protection Clause of the federal Constitution." *Id.* at ¶ 10, 837 P.2d at 466. Moreover, White's due process rights are not implicated. She argues that past circumstances operated to preclude her from obtaining her inheritance rights: (1) At the time of Jay Myers' death in 1961, the existing version of section 215 was unconstitutional; (2) She had no opportunity to undertake a paternity action during Jay Myers' lifetime due to her incapacity as a minor; and, (3) When the legislature added section 215(d) in 1977, she was precluded from using the amendment because her alleged father had been dead for sixteen years.

However, contrary to White's assertions, she had no "vested right" during any of these three periods to inherit from Gertrude Geller's estate through Jay Myers. As the court noted in *In re Smith's Estate*, 188 Okla.

158, 161, 107 P.2d 188, 191 (1940) (citations omitted) (emphasis added): "[T]he *prospect* of inheritance does not constitute a vested right and is not properly defined as property." The laws of descent and distribution are subject to change at any time, and "no one has a vested right to inherit the property of any person prior to the time descent is cast." *Minshall v. Berryhill*, 83 Okla. 100, 104, 205 P. 932, 935 (1921). Any rights of inheritance extended to White would not have accrued until the time of Gertrude Geller's death, *Hurt v. Noble*, 1991 OK CIV APP 59, 817 P.2d 744, and would be governed by the law in effect *at that time*. *See In re Estate of Baxter*, 1992 OK CIV APP 15, ¶ 17, 827 P.2d 184, 187.

White also asserts that section 215 is an "ex post facto law" and an unconstitutionally impermissible bill of attainder. These assertions also are without merit.

As noted above, White had no accrued or vested right to make a claim against Gertrude Geller's estate at any time before Mrs. Geller's death. Thus, application of the 1977 amendment of section 215 does not retrospectively affect any legal consequences or relations. It simply is not an ex post facto law.

Nor is section 215 a bill of attainder. White is correct in pointing out that bills of attainder are prohibited by U.S. Const. art. I, §§ 9 and 10, and Okla. Const. art. 2, § 15. A bill of attainder is a legislative act that inflicts punishment without judicial trial. *Board of Regents of Okla. Agric. Colleges v. Updegraff*, 205 Okla. 301, 237 P.2d 131 (1951), *rev'd on other grounds, Wieman v. Updegraff*, 344 U.S. 183 (1952). Punishment is a prerequisite for a law to be a bill of attainder. *Garner v. Board of Public Works of Los Angeles*, 341 U.S. 716, 722 (1951). A Supreme Court Justice has noted:

> Punishment presupposes an offense, not necessarily an act previously declared criminal, but an act for which retribution is exacted. The fact that harm is inflicted by governmental authority does not make it punishment. Figuratively speaking, all discomforting action may be deemed punishment because it deprives of what otherwise would be enjoyed. But there may be reasons other than punitive for such deprivation.

United States v. Lovett, 328 U.S. 303, 324 (1946) (Frankfurter, J., concurring). The Oklahoma Supreme Court also has recognized that a statute does not inflict punishment on an individual merely because it prevents him from doing what he otherwise could do in the absence of such statute. *Golden v. Okfuskee County Election Bd.*, 1986 OK 57, 723 P.2d 982. No punishment is imposed by section 215, and no offense is identified. Therefore, it is not a bill of attainder.

Conclusion

The Oklahoma Supreme Court has determined that 84 O.S. 1991 § 215, in its present form, and with the "special burdens" it imposes, is constitutional and protects the State's legitimate interest in the orderly disposition of estates. *King*, 1990 OK 138 at ¶ 10, 837 P.2d at 466. The statute provides four methods by which a child born out of wedlock can establish paternity for purposes of inheriting from or through the father. The evidentiary materials of record show that White is unable to establish paternity by any of the four statutory methods. Therefore, White is not an heir of Gertrude Geller[4] and has no

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[4] Of course, it follows that if White is not an heir—she is not entitled to inherit from Gertrude Geller through her alleged father, Jay Myers—she cannot be a pretermitted heir under 84 O.S. 1991 § 132.

standing in the probate proceeding. In effect, White asks this court to rewrite section 215 to allow the exhumation and genetic testing of her alleged father. This we cannot do. The right to inherit property is granted solely by statute, *In re Estate of Baxter*, 1992 OK CIV APP 15, ¶ 17, 827 P.2d 184, 187, and succession to estates is strictly a matter of statutory regulation, which cannot be changed by courts. *In re Estate of Swartz*, 1994 OK CIV APP 7, ¶ 3, 870 P.2d 179, 180.

In view of the foregoing rationale, the trial court's order, which in effect granted summary judgment against White on her counterclaim for determination of heirship in the probate proceeding, is AFFIRMED.

BOUDREAU, V.C.J., and REIF, J., concur.

January 12, 1999

APPENDIX B

IN THE DISTRICT COURT OF TULSA COUNTY
STATE OF OKLAHOMA

No. P-97-870-Winslow

In the Matter of the Estate of:

GERTRUDE JO GELLER, Deceased

JOURNAL ENTRY OF JUDGMENT AND ORDER STRIKING ALL PLEADINGS FILED BY HOLLY WHITE

On May 13, 1998, this matter came on for hearing on the motion by the petitioner/special administrator, David L. Fist ("Special Administrator"), to strike all pleadings filed in this matter by Holly White ("White").

The Special Administrator was present and represented by J. Douglas Mann of Rosenstein, Fist & Ringold. White was represented by Anthony P. Sutton of Herrold, Herrold, Sutton & Davis, P.A. Also appearing in this matter was Oliver S. Howard and Jeffrey D. Hassell of Gable, Gotwals, Mock, Schwabe, Kihle & Gaberino on behalf of Temple Israel Foundation, Inc. ("Temple Israel"); Frederic Dorwart and Richard J. Cipolla, Jr., of Frederic Dorwart, Lawyers, on behalf of Lori Ann Chozen, Michael Alan Chozen and Jay Myers Chozen (the "Chozen Family"); and W. Thomas Coffman of Johnson, Allen, Jones & Dornblaser on behalf of Marshal Geller.

After hearing argument of counsel for the Special Administrator, White and Temple Israel, and after reviewing

all of the briefs submitted by the parties with regard to the issue of White's standing to make a claim in this matter, the court found that the Special Administrator's motion to strike all of the pleadings filed by White should be sustained. The court further found that White has no standing to make any claim in this proceeding. In sustaining the Special Administrator's motion to strike all pleadings filed by White, and in finding that White has no standing to make a claim in this proceeding, the court adopts *in toto* the reasoning and legal authorities set forth in the briefs filed by the Special Administrator, Temple Israel, and the Chozen Family which specifically addressed the issue of the Special Administrator's motion to strike and White's standing in this matter.

The court further found that the Petition for Probate of Will, Appointment of Personal Representative and Determination of Heirs, Devisees and Legatees should be set for hearing on June 15, 1998, at 9:30 a.m.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Special Administrator's motion to strike all pleadings filed by Holly White is sustained and that Holly White has no standing to make a claim in this proceeding.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Petition for Probate of Will, Appointment of Personal Representative and Determination of Heirs, Devisees and Legatees is set for hearing on June 15, 1998, at 9:30 a.m.

_____

Judge of the District Court

APPROVED AS TO FORM:

/s/ J. Douglas Mann
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APPENDIX C

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Tuesday, April 6, 1999

THE COURT IS DIRECTED TO ENTER THE FOLLOWING ORDERS OF THE COURT:

91,420

In the Matter of the Estate of

GERTRUDE JO. GELLER, Deceased.

HOLLY WHITE

v.

DAVID L. FIST, Personal Representative of the Estate of Gertrude Jo. Geller, Deceased *et al.*

Certiorari denied.

All Justices concur.

/s/ Hardy Summers
Chief Justice

APPENDIX D

IN THE DISTRICT COURT OF TULSA COUNTY STATE OF OKLAHOMA

No. P-97-870

IN THE MATTER OF THE ESTATE OF

GERTRUDE JO GELLER,

Deceased.

AFFIDAVIT

STATE OF MISSOURI)
) ss.
COUNTY OF JACKSON)

I, Diane M. White, being of lawful age, and after first being duly sworn upon oath, state as follows:

1. I am the natural mother of Holly White.

2. I met Jay Myers, of Tulsa, Oklahoma, in Kansas City, Missouri, on or about March 22, 1959.

3. Jay Myers and I had a sexual encounter from which I became pregnant.

4. On December 25, 1959, I gave birth to my daughter, Holly White.

5. At the time of Holly White's birth, I was a resident of Kansas City, Missouri, and my domicile was in the state of Missouri. I am presently a resident of Kansas City, Missouri.

6. It is my belief and knowledge that Jay Myers is the natural father of my daughter, Holly White. I had no other sexual relationships which could have resulted in this pregnancy.

7. It is my belief and understanding that Jay Myers is the son of Gertrude Geller, the decedent in the above-referenced matter.

8. In June 1959, I informed Jay Myers that I was pregnant with his child. In response to my advice, he advised that he had discussed the matter with his father and that his father had told him to "do the right thing." He further inquired as to whether he and I should get married. He further offered to provide financial assistance.

9. In November 1959, nearing the term of my pregnancy, I called Jay Myers from a home for unwed mothers. Upon my advice to him that I felt lonely and afraid, he gave me his reassurance and again offered financial assistance.

10. At the end of January or the first of February 1960, I again contacted Jay Myers to advise him that his child was a girl and I further gave him a detailed description of Holly's physical appearance.

Further, Affiant saith not.

/s/ Diane M. White
DIANE M. WHITE

[Notary Omitted]

APPENDIX E

[Filed Jun. 5, 1998]

IN THE DISTRICT COURT
IN AND FOR TULSA COUNTY
STATE OF OKLAHOMA

Case No. P-97-870

IN THE MATTER OF THE ESTATE OF

GERTRUDE JO GELLER,

Deceased.

TRANSCRIPT OF PROCEEDINGS
HAD BEFORE DAVID E. WINSLOW, DISTRICT JUDGE
TULSA COUNTY, OKLAHOMA
MAY 13, 1998

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[54] The Ohio case is a 1988 case, a jurisdiction far removed from us, and far removed in time to the '92 decision by the Oklahoma Supreme Court.

I have had many cases where we have had attempts to prove the paternity of a child. It is true that 215 has, first of all, the four requisites, but it's also true that number three has its five elements. All of this runs together. This case, as far as the application of White, fails miserably in every regard.

I will sustain the Motion To Strike all of the White pleadings. She has no standing. She has never had standing under Oklahoma law. She does not have standing under Oklahoma law today. And there's going to be a

dramatic change in our inheritance laws for her to ever have standing.

Therefore, we will set this matter—first, I'll also say that I will adopt in toto the reasons stated in Mr. Mann's brief and Mr. Oliver's [sic] brief, joined by Dorwart and Hassell, and further stated by Mr. Coffman.

Gentlemen, we need now to arrive at a date for the formal hearing date for the admission of the will and the appointment of the personal representative.

* * * *

[Certification Omitted]

APPENDIX F

Okla. Stat. tit. 84 § 215

§ 215. Inheritance by and from illegitimate child

For inheritance purposes, a child born out of wedlock stands in the same relation to his mother and her kindred, and she and her kindred to the child, as if that child had been born in wedlock. For like purposes, every such child stands in identical relation to his father and his kindred, and the latter and his kindred to the child, whenever: (a) the father, in writing, signed in the presence of a competent witness acknowledges himself to be the father of the child, (b) the father and mother intermarried subsequent to the child's birth, and the father, after such marriage, acknowledged the child as his own or adopted him into his family, (c) the father publicly acknowledged such child as his own, receiving it as such, with the consent of his wife, if he is married, into his family and otherwise treating it as if it were a child born in wedlock, or (d) the father was judicially determined to be such in a paternity proceeding before a court of competent jurisdiction.

For all purposes, the issue of all marriages null in law, or dissolved by divorce, are deemed to have been born in wedlock. R.L.1910, § 8420. Laws 1977, c. 36, § 1, eff. Oct. 1, 1977.

Okla. Stat. tit. 84 § 215
(prior to 1977 amendment)

§215. Inheritance by and from illegitimate child.— Every illegitimate child is an heir of the person who in writing, signed in the presence of a competent witness, acknowledges himself to be the father of such child; and

in all cases is an heir of his mother; and inherits his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock; but he does not represent his father or mother by inheriting any part of the estate of his or her kindred, either lineal or collateral, unless before his death his parents shall have intermarried, and his father after such marriage, acknowledges him as his child, or adopts him into his family; in which case such child and all the legitimate children are considered brothers and sisters, and on the death of either of them, intestate, and without issue, the others inherit his estate, and are heirs, as hereinbefore provided, in like manner as if all the children had been legitimate; saving to the father and mother respectively, their rights in the estates of all the children in like manner as if all had been legitimate. The issue of all marriages null in law, or dissolved by divorce, are legitimate. R.L.1910, § 8420.

C.L.Dak.1887, § 3403; C.S.1921, § 11303; St.1931, § 1610.